

ARTIST'S GUIDE TO THE

visual artists rights act

UNDERSTANDING YOUR
(LIMITED) MORAL RIGHTS

VLA

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Lawyers and
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Your (Limited) Moral Rights

Is a violated Calder still a Calder? In 1958, Alexander Calder's award-winning sculpture "Pittsburgh" underwent some unexpected changes after it was displayed in the rotunda of the Greater Pittsburgh International Airport. The free-moving, graceful mobile was motorized and re-weighted without Calder's knowledge, and its original black and white colors were repainted in pea green and gold.

So is a violated Calder still a Calder? Most would agree that it is not. Art has the right to be left alone, and the alteration or destruction of a work without the artist's consent insults the artist and degrades our culture. France, Germany, Italy, most other European nations, along with some Latin American nations, have long recognized the concept of the *droit moral*, a philosophy that creates rights for an artist, based on the belief that the integrity of an original work should be protected and preserved.

Do American artists enjoy the same protection? What rights does an American visual artist have after a work is sold, and how is the artist's creation protected from future alteration or destruction? The Visual Artists Rights Act of 1990¹, known as VARA, addresses these issues by recognizing and protecting the moral rights of an artist. Moral rights are based on the assumption that an artist's honor and livelihood are dependant upon the presentation of his work as created, and that alteration can damage the artist's reputation. Moral rights legislation acknowledges a continuing relationship between the artist and his work that exists even when the artist does not own the actual work or its copyright.

VARA is a part of United States copyright law, and it preserves the artist's moral rights by protecting certain works of art from being altered or destroyed without the artist's consent. VARA grants two primary rights:

- The right of attribution permits the artist to claim or deny authorship of the work, which allows the artist to dissociate himself with any undesirable changes to the original work. Therefore, artists can prevent the use of their name as the creator of a work in the event of distortion, mutilation, or other modification of the work that would be prejudicial to their honor or reputation.
- The right of integrity enables artists to prevent the intentional distortion, mutilation or other modification of a work that is harmful to their honor or reputation. Where the work is of a "recognized stature," the right of integrity further includes the right to prevent any intentional or grossly negligent destruction of the work. VARA leaves the definition of "recognized stature" wide open, and courts must determine what this term means on a case-by-case basis.

VARA covers only a limited, fine art category of visual artworks: paintings, sculptures, drawings, prints, and still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are actually protected.

1. Visual Artists Rights Act: <http://www.law.cornell.edu/uscode/text/17/106A>

VARA does not apply to any of the following works: posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or containers. Also, VARA does not cover any work not subject to basic copyright protection.

Even if a work qualifies for VARA protection, there are several exceptions to coverage. For example, natural changes resulting from aging, decay, or the inherent quality of the materials are not covered under VARA. Similarly, modification resulting from conservation or public presentation involving lighting and placement is not covered, unless the modification is "grossly negligent." For example, while some natural fading is unavoidable for textiles, excessive fading caused by overexposure to direct sunlight could be considered "grossly negligent" behavior, and this type of action could violate VARA.

In addition, the right of attribution does not apply to a reproduction, depiction, or portrayal of a work. Protection is triggered only in the event of a distortion, mutilation, or modification that is prejudicial to one's honor or reputation.

If the work is part of a building, VARA rights do not apply if the art was placed in the building before December 1990, or if the artist and the building owner entered into a written agreement on or after December 1990, stating that the work may be subject to damage by reason of removal from the building. If the building owner wants to remove a work, VARA rights will not apply if (1) the building owner has made a diligent effort to notify the artist of the intent to remove the work, or (2) the artist received the notice, and failed to remove the work or pay for removal within 90 days after receiving the notice.

Several additional points are critical to understanding the basics of VARA protection:

- Moral rights can be waived (signed away) if the artist consents in writing.
- If the work is created by more than one artist, one creator's waiver applies to the entire group of artists.
- Artists who contract to create a work for hire will not enjoy VARA protection for the work. A work made for hire is a work created by an employee within the scope of employment or commissioned under contract. With a work for hire, the copyright owner is the entity that pays for it, not the person who creates it.
- The artist's rights under VARA persist during the artist's life for works created on or after June 1991. For works created before June 1991, the rights persist for the duration of the copyright, which may be as long as the artist's life plus 70 years.

In order to fully protect themselves, parties to a transaction involving moral rights, especially those with waiver provisions, should always seek legal advice when contracting for the commission or sale of a work.

An effective waiver must be very specific: it must specify the identity of the work and the uses to which the waiver applies. This can help strike a balance between the interests of artists and clients, by allowing negotiations to determine specific uses for the waiver. At a minimum, the waiver prevents the artist from being completely surprised by a modification of the work, because the contract will specify the circumstances under which moral rights are waived.

Artists can attempt to contract for the protection of their work by negotiating agreements that encourage the preservation of the original creation. Such contracts may not be popular with owners and buyers, and negotiating this type of protection may not be possible for the artist, who may not enjoy significant bargaining power. Each artist will have to evaluate the facts and circumstances of each agreement in order to determine whether or not the artist will enjoy moral rights protection.

Resources

Crawford, Tad. *Business and Legal Forms for Fine Artists*

Crawford, Tad. *Legal Guide for the Visual Artist*

Grant, Daniel. "The Visual Artists Rights Act at 20," *Huffington Post*, February 7, 2011

Kearns, Thomas D. and Carolyn Sha. "Understanding Artists' Rights in Contracts for Building Art," *New York Law Journal*, June 29, 2015

Kearns, Thomas D. and Carolyn Sha. "When Art Meets Building: A Primer on the Visual Artists Rights Act," *New York Law Journal*, June 30, 2014

Lerner, Ralph E. and Judith Bresler. *All About Rights for Visual Artists*

St. Louis Volunteer Lawyers and Accountants for the Arts. *Anatomy of a Contract*

St. Louis Volunteer Lawyers and Accountants for the Arts. *Copyright Basics*